

NO. A05-0121

State of Minnesota  
In Supreme Court

McNeilus Truck &amp; Manufacturing, Inc.,

*Relator,*

v.

County of Dodge,

*Respondent.*


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**RELATOR'S REPLY BRIEF**

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## ARGUMENT

### A. Standard of Review.

The articulation of the standard of review in Respondent's Brief (p. 13) is at least partially wrong. The County asserts that the "clearly erroneous" standard applies. While Relator does not dispute that this is the correct standard for reviewing factual determinations, it most vigorously asserts that a different standard applies when dealing with questions of law. As stated in Relator's Brief (at p. 16), "As to questions of law, this Court always has plenary power." *Nagaraja v. Commissioner of Revenue*, 352 N.W.2d 373, 376 (Minn. 1984). The core issue of exclusion (or rejection, as the case may be) of otherwise valid evidence of comparable sales of real estate merely because they occurred in different states pursuant to an unpromulgated rule of exclusion (or rejection) is certainly a question of law.

### B. Respondent's Attempt to Distinguish "Exclusion" from "Rejection" is a Distinction Without a Difference.

Counsel for Dodge County argues (Respondent's Brief at pp. 14-16), with apparent sincerity, that the unpromulgated (or *de facto*) rule of the Tax Court does not really have the effect of *excluding* evidence, since the Court in this case permitted Relator's appraiser to present his testimony and did not reject his appraisal as an exhibit.

In other words, Dodge County is arguing that it is permissible to openly and systematically *reject* all evidence of out-of-state comparables pursuant to Tax

Court policy so long as you do not formally exclude testimony from the record. That would be like arguing that a governmental unit could comply with voting rights legislation by permitting individuals to register to vote, even though it did not actually allow them to vote.

In addition to being absurd on its face, this argument fails for at least one other very important reason. It is well established that the Tax Court is obligated to use “its independent judgment in its evaluation of all the testimony determinative of the issues before it.” *Red Owl Stores, Inc. v. Commissioner of Taxation*, 264 Minn. 1, 10, 117 N.W.2d 401, 407 (1962).<sup>1</sup> See also *American Express Financial Advisors, Inc. v. County of Carver*, 573 N.W.2d 651, 658-59 (Minn. 1998), in which the Supreme Court held that the Tax Court’s “rejection” of certain data testified to and included in exhibits that were part of the record was “clearly against the weight of the evidence . . . [and] an abuse of discretion.”

Lest there be any credence given to the County’s contention that the Tax Court really did consider all the out-of-state comparables presented by Relator’s expert (Respondent’s Brief at pp. 14-17), one need only look at the Tax Court’s Opinion itself:

“[One of the] two issues in this case involving the experts’ use of comparables [is] (1) whether using comparables from outside Minnesota is appropriate” A.6.

“We ‘will not accept comparables from outside Minnesota unless the circumstances warrant . . . and unless differences in the markets and tax

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<sup>1</sup> That case involved a decision by the Board of Tax Appeals, which later became the Tax Court.

rates are explained.” *Id.*, citing *SPX*, *Jennie-O Foods*, and *DeZurick*, citations omitted.

“For the reasons set forth below, we do not accept McNeilus’s use of out-of-state comparables in this case.” *Id.*

The “reasons set forth below” are thoroughly and ably examined and rebutted by the Amici in their Brief (at pages 13-15). Those reasons include the mistaken assertion that “most” of the comparables were in the Chicago/Milwaukee area (leading in turn to mistaken conclusions about industrial vacancy rates, effects of unionization, greater density of population, etc.), while in fact most were located in small towns far from either Chicago or Milwaukee. Another Tax Court reason for rejecting the comparables (also cogently addressed in the Brief of Amici Curiae) was the erroneous assertion that Relator’s expert had “omitted from his testimony” any discussion of the tax structure in Illinois and Wisconsin. The discussion therein thoroughly rebuts such a claim. *Id.*

Another “reason” used by the Tax Court was Mr. DeCaster’s alleged failure to explain why his 15% adjustment for Comparable No. 1 was sufficient in view of Exhibit 12 (a document apparently prepared by a representative of the Wisconsin Department of Revenue – pure hearsay), which included comments about the condition of the roof and other components of the building.<sup>2</sup> Mr. DeCaster testified at length as to the issues presented by Exhibit 12. That

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<sup>2</sup> It seems ironic indeed that the Tax Court uses a hearsay statement by an unidentified Wisconsin state employee in an unsigned document to demean a comparable sale presented by a qualified appraiser and as a basis for rejecting such a comparable sale from Wisconsin relied upon by that appraiser in forming his opinion as to value.

testimony is discussed in some detail in Relator's Brief (at p. 15) and the analysis will not be repeated here. Suffice it to say that Exhibit 12's conclusion as to cost per square foot is virtually identical to the result obtained by Mr. DeCaster after he made the 15% adjustment that the Tax Court criticized. *See generally* Tr. at 118-30, 2/25/04.<sup>3</sup>

The Tax Court in this case rejected certain data testified to by a qualified appraiser solely because of the Tax Court's "rule of evidence." In a *post hoc* manner the Tax Court attempted to rationalize the application of its rule based on alleged differences in taxes, market conditions, and labor. However, as pointed out above and in Relator's prior Brief, these issues are red herrings. In view of these factors, as well as the numerous additional factors discussed in Relator's first Brief, it has been emphatically demonstrated that the Tax Court's Findings of Fact herein are "clearly erroneous."

**C. The Tax Court Failed to Exercise its Independent Judgment and to Explain its Reasoning.**

The County's Brief, in seeking to defend the Tax Court opinion, underscores the fact that the Tax Court acted as more of an advocate for a position than an impartial trier of fact. As set forth above, the Tax Court is obligated to use "its independent judgment in its evaluation of all the testimony determinative of

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<sup>3</sup> In addition, the Tax Court erroneously observes that "Comparable 1's average age is 30 years compared to the Subject Property's average age of 12-13 years." A.7. In fact, Comparable No. 1 was built in 1968, only four years before the main component of the McNeilus facility was built. A.26.

the issues before it.” *Red Owl Stores, Inc. v. Commissioner of Taxation*, 264 Minn. 1, 10, 117 N.W.2d 401, 407 (1962). Furthermore, the Tax Court’s holdings will not be given deference by the Supreme Court when the Tax Court has “*completely failed to explain its reasoning.*” *Harold Chevrolet, Inc. v. County of Hennepin*, 526 N.W.2d 54, 58 (Minn. 1995) (emphasis added).

The Tax Court opinion certainly does not demonstrate “independent judgment in its evaluation” of the record before it. As noted, in many ways it reads as if it is an adversary document. For example, the Tax Court opinion totally fails to mention the testimony of the McNeilus review appraiser, Gary Battuello or his review appraisal (Exhibit 20, S.R. 11-25; see Tr. at 126-228, 2/25/04) or the extensive fact testimony put on to rebut the testimony of the County’s appraiser and review appraiser. See Tr. at 5-30, 31-65, and 66-102, 2/25/04.

The Tax Court is to be an independent finder of fact, not an advocate. In this case, the failure of the Tax Court to carry out its function as an independent finder of fact and to consider all the evidence, as well as its failure to adequately explain its reasoning, are further examples of error.

**D. The Tax Court’s Abandonment of the Principle of Substitution Requires Reversal.**

The application of the Tax Court rule of evidence excluding (or rejecting) out-of-state comparables has resulted in the virtual abandonment of the bedrock principle of substitution in this case. Respondent Dodge County’s Brief (at pp.

15-16) contends that Relator's comparables are not sufficiently similar to the subject property, yet seeks to defend the attempt by the County's appraiser and the Tax Court to use sales of smaller warehouse distribution centers that are generally located on or in proximity to interstate transportation.

The McNeilus review appraiser, Gary Battuello – not even mentioned by the Tax Court in its opinion – testified regarding the principle of substitution. His review appraisal (Exhibit 20, S.R. 11-25) concludes that the approach taken by the County's appraiser, Mr. Jabs, is unreliable in that the properties he selected are not truly comparable (warehouse distribution facilities) and that he failed to make the necessary adjustments to reflect the massive changes to the McNeilus facility that would be required to make it (in its subdivided state) "comparable" to the warehouse distribution facilities to which it was being compared. *Id.* at pp. 3-6; *see also* G. Battuello testimony, Tr. at 160-94, 2/25/04. He concludes that the Jabs' comparables "do not meet the principle of substitution necessary for a comparable." *Id.* at 190. *See also* the discussion of cost of conversion to a warehouse distribution facility contained in *Hormel Foods Corp. v. Wisconsin Department of Revenue*, Wis. Tax Rep. (CCH) 400-741 WTAC 2004 (aff'd) No. 04-CV-1278 (Dane Co. Cir. Ct. October 2004), A.112-14.

The appraisers for Dodge County repeatedly in their testimony talked about "doing the math." Regarding the capital expenditures that would be required to make the conversion of the McNeilus facility to a warehouse distribution facility (see Exhibit 2), that is a major part of the problem here. Neither the appraisers for

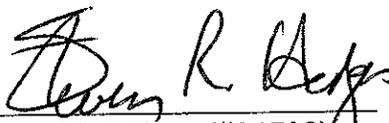
the County nor the Tax Court were willing to “do the math” to determine that the cost of converting the McNeilus facility to a warehouse distribution facility would be so expensive that such a conversion simply would not be feasible.

### CONCLUSION

The Brief of Respondent Dodge County has not presented either facts or law that can support the decision of the Tax Court in this case. The fact remains that the Tax Court has adopted its own unpromulgated rule of evidence that has the effect of telling qualified appraisers that they must exclude relevant data that their professional training and well established principles of appraisal would otherwise have them rely upon. Accordingly, for the reasons stated herein and in its prior Brief, Relator respectfully submits that the decision of the Tax Court must be reversed and the matter remanded for a new trial.

Respectfully submitted,

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